U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

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The Honorable John Conyers, Jr.
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Conyers:

Thank you for your letters of June 21, 2002, and August 14, 2002. We apologize for any inconvenience the delay in response may have caused. A similar response is being sent to the other signatories of your letter.

Your letters voice concerns with the Department of Justice for not disclosing a list of the identities of individuals who have been detained on immigration law violations or pursuant to a material witness warrant (issued by the judge presiding over a grand jury) and who are or were deemed by the government to have associations or information relating to the investigation of the September 11, 2001, terrorist attacks and related terrorist conspiracies. In the letters, you also challenge the wisdom and the legality of the Department's decision to close the immigration proceedings of such individuals.

The Department's policy is based on the professional judgment of senior law enforcement officials, including those from the Criminal Division of the Justice Department and the Federal Bureau of Investigation with leading roles in the September 11 investigation. In their view, disclosure of the identities of the detainees would endanger the ongoing investigation. To date, the enemies of our country, although monitoring the government's investigation, have had no way of collecting en masse a list of the names of individuals who are deemed by the U.S. Government to be useful investigative sources. While some information may have been available to our enemies, a compendium of the entire universe of information regarding the identities of detainees has never been provided, much less officially confirmed. The disclosure of such information (and the information that would be disclosed in the removal hearings for the detainees) may reveal sources and methods of the investigation to terrorist organizations. This in turn could allow terrorists to evade detection, and it could lead them to alter their future plans, creating greater danger to the public safety.

Although your letter refers to "secret arrests and detentions," it is important to note that the persons at issue are not being held incommunicado. The immigration detainees have been afforded access to counsel and have been provided with lists of attorneys who may handle their cases on a pro bono basis. In addition, they have been informed of the charges against them, and they have access to the courts and to the press. In legal challenges referred to in your letter, the plaintiffs are in essence seeking to mandate disclosure of the names of individuals who chose not to identify themselves to the press or public as September 11 detainees.

For these reasons, the Department has vigorously defended its right not to disclose the identities of the individuals and to close the immigration proceedings to the press and public. Litigation involving this issue remains pending, and in each of the cases to which your letters refer, the courts have confirmed the correctness, or at least the defensibility, of the Department's positions.

- As you note, the U.S. District Court for the District of Columbia ruled against the Department in Center for National Security Studies v. Department of Justice, No. 01-2500, a case involving a Freedom of Information Act (FOIA) request for disclosure of the names of detainees connected to the September 11 investigation. But the district court granted a stay pending appeal, recognizing that the government's position was entitled to be heard in the court of appeals. Argument was heard by the U.S. Court of Appeals for the District of Columbia Circuit on November 18, 2002, and a decision is pending.

- With respect to access to immigration hearings, on October 8, 2002, in North Jersey Media v. Ashcroft, No. 02-2524, the U.S. Court of Appeals for the Third Circuit upheld the Department's policy of closing special interest immigration proceedings as an appropriate and lawful means of protecting our nation, stating: "Since the primary national policy must be self-preservation, it seems elementary that, to the extent that open deportation hearings might impair national security, that security is implicated . . . ." On December 3, 2002, the Third Circuit declined a request for rehearing *en banc*.

- In Detroit Free Press, Inc. v. Ashcroft, No. 02-1437, the U.S. Court of Appeals for the Sixth Circuit considered whether the immigration hearings of Rabih Haddad, a Lebanese citizen who admits to having been illegally present in the United States for several years, should be open to the general public and press. Haddad, a Lebanese citizen, is the co-founder and former chairman and CEO of the Global Relief Foundation ("GRF"). The U.S. Department of Treasury has frozen the assets of GRF and designated that organization as a "Specially Designated Global Terrorist," based in part on evidence that Haddad worked for a predecessor to al Qaida in the early 1990s and that GRF has supported al Qaida and other known terrorists. See Global Relief Foundation, Inc. v. O'Neill, 207 F. Supp.2d 779 (N.D. Ill. 2002) (upholding asset freeze), aff'd, __ F.3d ___, 2002 WL 31890724 (7th Cir. Dec. 31, 2002). In Detroit Free Press, The Sixth Circuit ruled against the Government's closure of Haddad's immigration hearings pursuant to a policy of

closing all special interest immigration proceedings, but found that the Government has a compelling interest in preventing terrorism and closing such proceedings that could reveal information allowing "terrorist organizations to alter their patterns of activity to find the most effective means of evading detection." In subsequent proceedings, the district court held that the Sixth Circuit's decision justified the immigration judge in closing portions of Haddad's hearings to prevent the disclosure of information that could impair the government's ongoing terrorism investigation. Meanwhile, on November 22, 2002, an immigration judge denied Haddad's request for asylum and ordered him and his family removed from the United States, concluding that he presented "a substantial risk to the national security of the United States" on the basis of his direct ties to GRF. The same immigration judge also denied Haddad's request for release on bond pending the completion of his immigration hearings, concluding that he presented both a flight risk and a threat to national security.

Your letter of June 21 criticizes an interim regulation issued by INS Commissioner James Ziglar regulating disclosure by state officials of INS detainees housed in state and local detention facilities. But that regulation has been upheld by New Jersey state courts, which have confirmed that such questions of disclosure are regulated by federal law. See American Civil Liberties Union of N.J. v. County of Hudson, 799 A.2d 629 (N.J. Super. Ct. App. Div. 2002). In essence, the regulation requires that requests for such information be forwarded to the Immigration and Naturalization Service (INS) so that they can be considered under the provisions of FOIA rather than the various state and local rules governing the disclosure of information. In the absence of this rule, there would be no uniform or predictable standard for the handling of such information. The rule does not, however, create any new exemptions under the FOIA. In order to withhold information regarding the detainees, the INS must demonstrate that the information falls within the exemptions of the FOIA. The Department's protection of such information under FOIA is, as referenced above, on appeal to the D.C. Circuit in Center for National Security Studies v. Department of Justice.

Finally, your letter of June 21 criticizes the Department's use of material witness warrants. The Department's longstanding and wide-spread practice of using material witness warrants in the context of grand jury investigations is consistent with the one circuit court opinion on the issue. See Bacon v. United States, 449 F.2d 933 (9th Cir. 1971). Moreover, a decision by the Chief Judge of the U.S. District Court for the Southern District of New York has upheld the use of the material witness statute to secure the attendance of witnesses before the grand jury, and explains in some detail the analytical errors in United States v.

With respect to those individuals being held as material witnesses, it is the Department's position that information regarding persons held as material witnesses could needlessly reveal important information about the progress and scope of the investigation into the September 11th attacks. As we have noted on other occasions, all persons held as material witnesses were informed of their right to counsel, and provided with counsel at the government's expense if they could not afford their own counsel, for the duration of their detention and their detention is reviewed by federal judges in the districts in which they are held. Moreover, almost all of the material witnesses are or have been witnesses in grand jury proceedings, which impose an obligation of secrecy upon the Department (but not the witness). See Federal Rule of Criminal Procedure 6(e). Providing the numbers of material witnesses in grand juries investigating a particular matter (the September 11 attacks) as of particular dates would improperly disclose "matters occurring before the grand jury."

We appreciate your concerns about these matters. If we can be of further assistance on this or any other matter, please do not hesitate to contact this office.

Sincerely,

Jamie E. Brown

Jamie E. Brown
Acting Assistant Attorney General